Supreme Court, U.S.
FILED
JAN 7 1988
SPANIOL, JR.
CLERK

Nos. 87-253 *et al.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,
v.
CHAN KENDRICK, *et al.*

On Appeal From the United States District Court for the District of Columbia

BRIEF OF UNITED FAMILIES OF AMERICA

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January 7, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Congress may involve religiously-affiliated organizations, "as appropriate," along with other charitable organizations, voluntary associations, and private sector groups, in a grant program designed to support projects to discourage adolescent pregnancy and to provide care for pregnant adolescents. See the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, United Families of America was defendant-intervenor in the district court and is appellant in No. 87-775; Sammie J. Bradley and Katherine K. Warner were defendants-intervenors in the district court; and Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and the American Jewish Congress were plaintiffs in the district court, are appellees in Nos. 87-253, 87-431, and 87-775, and are cross-appellants in No. 87-462.

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OPINIONS BELOW

The April 15, 1987 opinion of the district court is reported at 657 F. Supp. 1547 (D.D.C. 1987). It is reproduced as Appendix A to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 1a-46a). The September 13, 1987 final judgment of the district court is unreported. It is reproduced as Appendix D to the Jurisdictional Statement in No. 87-431 (U.S. J.S. App. 52a-55a).

JURISDICTION

On May 15, 1987, the Solicitor General filed a notice of appeal in No. 87-253 from an interlocutory order of the district court issued April 15, 1987. On July 7, 1987, the Chief Justice extended the time within which to docket that appeal to and including August 13, 1987, and the appeal in 87-253 was docketed on that date. On August 13, 1987, the district court issued a final order and opinion, incorporating the April 15, opinion, severing the term "religious organizations" from the AFLA "in all places that it appears," and permitting continued AFLA funding to non-religious organizations (U.S. J.S. App. 52a-55a). The Solicitor General filed a notice of appeal from that order on August 20, 1987, and docketed the appeal in No. 87-431 on September 14, 1987.

Kendrick, et al., filed a notice of conditional cross-appeal on August 25, 1987, and docketed the cross-appeal in No. 87-462 on September 16, 1987. On November 9, 1987, this Court noted probable jurisdiction in Nos. 87-253, 87-431, and 87-462. On September 12, 1987, United Families of America filed a notice of appeal from the court's final judgment of August 13, 1987, and docketed the appeal in No. 87-775 on November 10, 1987. This Court has jurisdiction pursuant to 28 U.S.C. 1252 (1982).[1]

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[1] This brief constitutes United Families of America's opening brief as appellee in support of appellant in Nos. 87-253 and 87-431. Should this Court note probable jurisdiction in No. 87-775, this

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Adolescent Family Life Act, 42 U.S.C. 300z *et seq.*, and the First Amendment of the United States Constitution.

STATEMENT OF THE CASE

1. In 1981, Congress enacted the Adolescent Family Life Act ("AFLA") as Title XX to the Public Health Service Act, Pub.L.No. 97-35, 95 Stat. 578 (1981). The purposes of the Act are to help adolescents "within the context of the family," to "promote self discipline and other prudent approaches" to adolescent pregnancy, to "promote adoption as an alternative," to promote the delivery of care services, to encourage research and demonstration projects, to support "evaluative research," and, finally, to "encourage and provide for the dissemination of results" from the projects. 42 U.S.C. 300z(b).

The AFLA "authorizes appropriations for demonstration grants to individuals, public and nonprofit entities for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. 97-161, 97th Cong., 1st Sess. 1 (1981). Three types of activity may be undertaken by grantees: "care services," "prevention services," and research. Care services include such services as adoption assistance, pediatric care or referral, maternity homes, educational and vocational services, child care, and homemaking assistance and education. Prevention services include such services as family-oriented approaches to teenage sexuality, pregnancy testing, nutritional services, and transportation. See generally H.R. Rep. 99-1022, 99th Cong., 2d Sess. 335 (1986). Plaintiffs-appellees do not challenge the research component of the AFLA.

No grants under the AFLA may be made for projects that provide abortion, abortion counseling, or abortion referral (unless such referral is requested by the adolescent and her parent or guardian),[2] and AFLA funds may not be used for the provision of family planning services (unless such services are otherwise unavailable in the community). 42 U.S.C. 300z-10(a); *id.*, § 300z-3(b)(1).

brief will constitute United Families of America's opening brief as appellant.

The AFLA requires each applicant for a grant to describe how it will involve in the program, "as appropriate in the provision of services, . . . religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" 42 U.S.C. 300a-5(a)(21)(B). In practice, at most 23 of the 100 grantees have been religiously affiliated. *Compare* J.A. 748-54 *with* 755-56. (This figure includes 4 state or local government agencies cited by the district court for religious involvement).

The authorizing committee stated that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." S. Rep. 98-496, 98th Cong., 2d Sess. 10 (1984).[3] Pursuant to his

[2] This section "consolidated and clarified" the prohibition on "abortion related activities under prior law." H. Conf. Rep. No. 97-208, 97th Cong. 1st Sess. (1981) *reprinted in* [1981] U.S. Code Cong. & Admin. News 1010, 1178-79.

[3] The conferees stated that in reaching agreement "they have not addressed many of the difficult issues that surround" the AFLA and "note their intention to examine these issues in comprehensive and balanced hearings during the 99th Congress." H.R. Conf. Rep. 98-1154, 98th Cong., 2d Sess. 3 (1984). It therefore directed that "the reports filed to accompany H.R. 5600 and S. 2616 [including S. Rep. 98-496] not be considered as legislative history for the purposes of interpreting either this conference agreement of [sic] the Adolescent Family Life Act." *Ibid.* Since that time, no hearings have been held and the AFLA has continued to be funded by Congress. We doubt seriously that the Conference Committee's reservations went to the issues of prohibiting the promotion or teaching of religion or the neutrality of distribution of funds—the only issues pertinent here—and in any event, we believe S. Rep. 98-46 is the best available evidence of congressional thinking at

delegated authority, the Secretary attaches some 12 conditions to each AFLA grant, including the following:

> 7. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.

J.A. 757, 759, 761 (grant conditions for 1984-86). On at least one occasion, a religious organization was dropped from the program for violation of this condition. J.A. 742-43 (Catholic Charities of Arlington).

In initiating the AFLA program in 1981 and in reauthorizing it in 1984, Congress considered possible conflicts with the Establishment Clause and concluded that the program comported with Constitutional standards. S. Rep. No. 97-161, 97th Cong., 1st Sess. 15-16 (1981); S. Rep. 98-496 at 9-10. "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16.

2. Appellees Chan Kendrick, et al. (hereafter "plaintiffs-appellees"), filed this action against the Secretary of Health and Human Services on October 27, 1983, pursuant to 28 U.S.C. 1331. United Families of America ("UFA") intervened in the district court and participated as a defendant-intervenor in support of the constitutionality of the AFLA. UFA is an organization with members who are parents of minor children eligible for services provided under the AFLA. Intervention was sought on the ground that the relief requested by the plaintiffs would diminish the range, diversity, and effectiveness of programs available to UFA's members. See Memorandum in Support of Motion to Intervene (filed

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the time of reauthorization. S. Rep. 97-161, 97th Cong., 1st Sess. (1981), which accompanied the initial authorization, is fully authoritative and does not differ in any essentials from the 1984 report.

Oct. 2, 1984); 87-775 J.S. App. B (order granting UFA's motion to intervene).

Finding "that the material facts are not in dispute and that summary judgment is appropriate" (U.S. J.S. App. 7a-8a), the district court held that the AFLA was unconstitutional on its face and as applied "*insofar as it involves religious organizations in carrying out the purposes of the Act*" and declared that "the involvement of religious organizations as AFLA grantees or subgrantees is unconstitutional." (U.S. J.S. App. 2a, n.2. (emphasis in original)).

The court found that the AFLA had a secular purpose (U.S. J.S. App. 17a-22a), but held that the statute on its face has a primary effect of advancing religion because "of its use of religious organizations for educating and counseling of teenagers on matters relating to religious doctrine" (U.S. J.S. App. 22a, 27a). Referring to several instances in which individual grantees allegedly used AFLA funds for religious purposes, the court also held that the AFLA is unconstitutional as applied. *Id.* at 32a-38a. The court did not, however, make findings that any more than a few of the grantees had been involved in these practices.

As a final basis for invalidation, the court held that the AFLA fostered an excessive entanglement between church and state. Because the religious organizations that were funded "have a religious character and purpose, the risk that AFLA funds will be used to transmit religious doctrine can be overcome only by government monitoring so continuous that it rises to the level of excessive entanglement" (U.S. J.S. App. 40a). The court declined, however, to determine which, if any, of the grantees were "pervasively sectarian" under this Court's definition. U.S. J.S. App. 24a-25a; see also *id.* at 54a-55a.

On August 13, 1987, the court issued a final opinion and order, severing the term "religious organizations" from the AFLA and barring such organizations from

participation in AFLA programs. The court stated that the "AFLA is fully and constitutionally operative as law in a manner consistent with the intent of Congress absent its references to 'religious organizations.'" U.S. J.S. App. 54a. The court also declined to clarify what it meant by the term "religious organizations," stating that there is "ample precedent in numerous statutes and federal regulations defining the term." *Id.* at 55a. The order also dismissed the case from its docket. *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the first case since *Bradfield v. Roberts*, 175 U.S. 291 (1899), in which this Court is asked to determine whether, and on what terms and conditions, religiously-affiliated organizations may participate in government-funded social welfare programs outside the area of elementary, secondary, and higher education. This case will affect hundreds of federal, state, and local programs in which religiously supported, inspired, or affiliated private groups are involved with the government in carrying out charitable social welfare activities.

The precise question is whether religiously affiliated organizations may participate as grantees in the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) 300z *et seq.*, a federal program that funds public and private community-based efforts to deal with the problem of teenage pregnancy.[4] Congress has determined that "nonprofit religious organizations have a role to play in the provision of services to adolescents" (S. Rep. 97-161, at 15-16) and has directed the Secretary to make grants to a broad spectrum of charitable and voluntary associations, both religious and nonreligious.

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[4] This case also directly affects state programs similar to the AFLA. See Maine LD 1682 (June, 1987); Wis. Stat. Ann. § 46.93 (1987), as amended by 1987 Wis. Act 27, § 863br, reprinted in Wis. Legis. Serv. No. 2, at 207 (West 1987). See H.R. Rep. 99-1022, 99th Cong., 2d Sess. (1986) (state-by-state survey of teen pregnancy programs).

The district court, disregarding *Bradfield* and the long-standing historical precedent of church-state interaction in the social welfare field, has adopted an extreme and unsettling construction of the Establishment Clause. According to the court, when the government chooses to move into a social welfare field previously left to private charitable endeavor, it *must* single out and exclude religiously affiliated, even religiously inspired, organizations simply because their religious mission coincides with the purposes of the governmental program. Under the district court's order, organizations are excluded from the AFLA not because they have violated the rules of the program or used government funds for religious functions, but simply because of their beliefs—their affiliation or religious inspiration. Far from being neutral, this approach uses the fiscal muscle of the federal government to crowd out religious alternatives from all social welfare fields the government chooses to assist.

Our position in this case is straightforward: *per se* exclusion of an otherwise eligible organization from participation in a government program, merely because of its religious affiliation or identity, would violate the Free Exercise and Equal Protection Clauses of the Constitution. *Widmar v. Vincent*, 454 U.S. 263 (1981); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). A categorical exclusion of religiously-affiliated groups is inimical to the vision of religious pluralism reflected by the First Amendment, and stands on its head the Establishment Clause's central principle of neutrality.

Neither, of course, may religious organizations be *preferred* in government social welfare spending programs. The primary question in cases like this one is whether the method of selection of private grant recipients and the enforcement of grant conditions is constitutionally *neutral* with respect to religion. The key factor under this Court's cases is that "the benefit of government programs and policies [must be] generally avail-

able, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh v. Chambers*, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting). See also *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976) (plurality opinion per Blackmun, J.) ("religious institutions need not be quarantined from public benefits that are neutrally available to all").

This is not to say that religious organizations may divert government funds to sectarian uses. On the contrary, if any grantee diverts AFLA funds to its own purposes in violation of the terms of the grant, including using those funds to teach or promote religion, the grantee should be required to return the misspent funds and, in appropriate cases, should be excluded from further participation in the program. If the grantee complies with the terms of the program and uses AFLA funds solely in furtherance of the statutory objectives, however, it should be allowed to participate without discrimination or distinction based on religious belief, affiliation, or inspiration. We do not ask for special preference for religious organizations; we ask only that government be neutral toward religion.

The three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), embodies this requirement of neutrality, and fully supports the constitutionality of the AFLA. Our argument is organized around this Court's application of the *Lemon* test to three different categories of cases. The first consists of cases in which government programs distribute funds in a genuinely and reliably neutral manner. The second consists of programs where there is greater danger that the funding may favor religion, but where constitutional neutrality can be achieved through restrictions on the religious use of funds. The third consists of cases in which aid is targeted to pervasively sectarian organizations. We will demonstrate that the AFLA is constitutional under any of the approaches taken by this Court. The AFLA is entirely neutral in its distribution of funds, and the district court

judgment should be reversed on that ground alone. Alternatively, the court should be reversed for excluding all religiously affiliated organizations from participation in all parts of the AFLA program, in the absence of necessary findings that grantees have used AFLA funds for specifically religious purposes, that AFLA grantees are pervasively sectarian, and that all AFLA-funded services are susceptible to religious use.

ARGUMENT

THE ESTABLISHMENT CLAUSE PERMITS THE INVOLVEMENT OF RELIGIOUSLY-AFFILIATED ORGANIZATIONS, ALONG WITH OTHER PRIVATE VOLUNTARY AND CHARITABLE ASSOCIATIONS, IN GOVERNMENT-SUPPORTED SOCIAL WELFARE PROGRAMS, INCLUDING THE AFLA

A. Neutrality Is The Dominant Consideration In Evaluating the Constitutionality of Social Welfare Programs Involving Religiously Affiliated Organizations

In the context of publicly-supported, privately-administered social welfare programs, as elsewhere, the Establishment and Free Exercise Clauses work together to guarantee religious neutrality, pluralism, and choice. The Establishment Clause precludes using government resources to favor religion, and the Free Exercise Clause (along with related conceptions of Equal Protection) precludes discrimination against religion or religious organizations. Government must not "interject any religious activity into a nonreligious context." *Walz v. Tax Commission*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring). Nor may the Establishment Clause "be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

The unifying theme of this Court's Religion Clause jurisprudence is the principle of neutrality. As the Court stated in *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976), "Neutrality is what is required. The State must confine itself to secular objectives, and neither

advance nor impede religious activity." See also *Grand Rapids School District v. Ball*, 473 U.S. 373, 382 (1985) ("the government [must] maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Board of Education*, 330 U.S. 1, 18 (1947) (the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary.")

If a government program neither favors nor disfavors religion or religious organizations, as compared to other organizations or systems of thought or belief, the purposes of the Religion Clauses are protected in three ways. First, the neutrality shows that the legislative *purpose* has no specific reference to religion; religion is affected only as part of a larger secular scheme. The principle of neutrality thus "require[s] that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws." *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). Second, neutrality guarantees that the *effect* of the program is "one that neither advances nor inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). To favor religious organizations would advance religion; to disfavor religious organizations would inhibit religion; to act neutrally protects pluralism and religious choice. Third, neutrality ensures that the government program will not be perceived as an *endorsement* of religion. *Witters v. Department of Services*, 106 S. Ct. 748, 753 (1986); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). If government neither favors nor disfavors religion, objective observors will be able to see that "adherence to religion [is not] relevant to a person's standing in the political community." *Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J, concurring).

To exclude a private organization from participation in public benefits solely because of religious affiliation or inspiration violates the Free Exercise Clause by imposing

a penalty for religious affiliation. "[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges, or benefits. 'State power is no more to be used so as to handicap religions than it is to favor them.'" *McDaniel v. Paty*, 435 U.S. 618, 639 (Brennan, J., concurring) (quoting *Everson v. Board of Education*, 330 U.S. 1, 18 (1947)) (footnote omitted). See also *Widmar v. Vincent*, 454 U.S. 263 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Niemotko v. Maryland*, 340 U.S. 268 (1951). The animating values of the Religion Clauses are diversity, pluralism, and choice (*Walz v. Tax Commission*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring))—all best achieved through a policy of neutrality rather than one of rigid separation.

B. Long-standing History and Precedent Support the Participation of Religious Organizations in Publicly Supported Social Welfare Programs on an Equal Footing With Other Private Groups

The difficulty in faithfully applying the purposes of the First Amendment in this case arises from the substantially changed nature of government in the past two hundred years. The central problem now is how to apply the broadly-stated proscriptions of the First Amendment in specific cases arising many years later and involving unanticipated circumstances, remaining faithful to the intentions of the Framers, but without engaging in anachronistic or reductionist reasoning. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).[5]

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[5] To the extent that parallels can be drawn to specific historical practices, these suggest an understanding of church-state separation that emphasizes the freedom of religious institutions from government control and a refusal to support specifically sectarian teaching—not a divorcement of religious institutions from charitable functions. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 48-49 (1815) (Story, J.). Where religious institutions were well-suited to advance governmental purposes (as, for example, in training the Indian tribes in "the arts of civilized life"), even such ardent "separationists" as Thomas Jefferson did not hesitate to sup-

Eighteenth-century America closely resembled the Lockean vision of distinct, separate "jurisdiction" for the respective authority of church and state;[6] but what was thought properly within the realm of each differs drastically from the way those roles are commonly viewed today. The *church* was the proper organ of social welfare, charity, and refuge; "separation of church and state" was a jurisdictional notion that required that government neither support nor interfere with these functions of religion. For the Framers, the concepts of "separation" and "neutrality" were effectively synonymous: government neutrality with respect to religion meant leaving religion alone, its areas of activity untouched and unchallenged by state power.

Since 1791, and especially in the twentieth century, the scope of governmental activity has broadened to encompass areas formerly left to the private sphere—notably education and social welfare. See *Thomas v. Review Board*, 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting). But this does not—and we submit *cannot*—mean that as government expands, the scope of religious life must be forced to contract. Any expansion of the scope of government should be achieved in a way that allows space for religion, so that the people can continue to exercise religious choice even in areas of life in which the government has become involved. *Bowen v. Roy*, 106 S. Ct. 2147, 2169 (1986) (O'Connor, J., dissenting).

With the expansion of governmental power generally, this Court has recognized that a rigid "separation" of

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port them. See, for example, 7 Stat. 78 (1846) (Jefferson's treaty with the Kaskaskia Indians, proclaimed Dec. 23, 1803).

[6] See Locke, *A Letter Concerning Toleration*, in P. Kurland & R. Lerner, 5 The Founders' Constitution 52 (1987); *Abington School Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring); Sandler, *Lockean Ideas in Jefferson's Bill for Establishing Religious Freedom*, 21 J. of the Hist. of Ideas 110 (1960); Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted at 330 U.S. 63 (1947).

church and state will not always serve the central objectives of neutrality and religious choice. This Court has recognized that some level of interaction between church and state is inevitable and necessary. *Lynch v. Donnelly*, 465 U.S. 668, 672-74 (1984); *Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) (plurality opinion per Blackmun, J.). Preservation of religious freedom under conditions of the modern welfare state requires a shift in emphasis from "strict separation"—meaning a homogeneously secular public sphere—to neutrality, a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). See Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 522 (1968).

Accordingly, this Court has never held that religious organizations must be excluded from publicly-supported social welfare programs. On the contrary, in the case most directly on point, *Bradfield v. Roberts*, 175 U.S. 291 (1899), this Court upheld a grant of $30,000 by Congress to a hospital, even though the hospital was "conducted under the auspices of the Roman Catholic Church," which "exercise[d] great and perhaps controlling influence over the management of the hospital." *Id.* at 298. The decisive question for the Court was whether the hospital would fulfill the secular purposes of the statute; the mere fact of Providence Hospital's religious affiliation was "wholly immaterial." *Id.* at 299.

More recently, Justice Blackmun, writing for a plurality in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), stated the point succinctly. "It has long been established," he wrote, "that the State may send a cleric, indeed, even a clerical order, to perform a wholly secular task." *Id.* at 746. "[R]eligious institutions need not be quarantined from public benefits that are *neutrally available to all*." *Ibid.* (emphasis added).

This means that religious organizations may, and do, participate as grantees in a wide variety of publicly funded programs.[7] Indeed, grants to private organizations have become a favored instrument for furthering governmental social welfare objectives.[8] As the Senate Labor and Human Resources Committee stated in reauthorizing the AFLA: "Charitable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy." S. Rep. No. 98-496, 98th Cong., 2d Sess. 10 (1984).

The interaction of governmental and religious agencies in many areas of social welfare is so important that it is difficult to imagine how public purposes could

[7] *See generally* B. Coughlin, Church and State in Social Welfare (1965); Giannella, *supra* 81 Harv. L. Rev. at 554-560; McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. Rev. 405, 420-24; Pickrell & Horwich, *"Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 Law & Contemp. Prob. 111, 113 n.16 (1981). Among the federal programs cited by these authors and in other sources are: 7 U.S.C. 1722 (international famine relief); 29 U.S.C. 771(b)(1) (1982) (rehabilitation for the handicapped); Hill-Burton Act of 1946, 42 U.S.C. 291 (1982) (hospital construction); 42 U.S.C. 620 (1982) (state child welfare services); 42 U.S.C. 632(c) (1982) (Work Incentive Program); 42 U.S.C. 1397a (1982) (Social Services Block Grant); 42 U.S.C. 2931-2932 (1982) (day care); 42 U.S.C. 3027(a)(14) (multi-purpose senior centers). Many more programs at the state and local level involve religious organizations. 42 U.S.C. 9805 (community development), P.L. No. 100-77, 101 Stat. 482, § 412, to be codified at 42 U.S.C. 11372 (Stewart B. McKinney Homeless Assistance Act).

[8] See American Jewish Congress, Report of Task Force on Public Funding of Jewish Social Welfare Institutions 10 (1986) ("In the past several decades, government has taken increasing responsibility for fulfilling the health and welfare needs of its citizens, and has done so not through the creation of government agencies but through the direct funding of private institutions or the provision of individual entitlements."); Pickrell & Horwich *supra* at 111, 112-14 (1981).

be achieved without it. Emergency shelters and feeding programs, for example, rely heavily on the availability of church and synagogue facilities and religious volunteers, with the government supplying all or part of the operating costs of food, blankets, and the like. See, *e.g.*, Simpson, "Salvation Army's Job Is Growing Tougher As Cries for Help Arise," Wall St. J. at sec. 1, p. 1 (Dec. 21, 1987). Outreach programs to undocumented workers to explain the features of the new immigration law depend on churches to mediate between an apprehensive populace and the government's enforcement bureaucracy. See P.L. 99-603, 100 Stat. 3359 (1986). Religious orphanages and adoption services are necessary to ensure that the free exercise rights of parents and children are accommodated. See *Wilder v. Sugarman*, 385 F.Supp. 1013 (S.D.N.Y. 1974) (three judge court) (rejection of racial challenge), *modified sub nom. Wilder v. Bernstein*, 645 F.Supp. 1292, 1329-39 (1986) (settlement of as-applied challenge).

An American Jewish Congress task force describes the role of one not atypical religious group in government-supported social welfare activity:

> The American Jewish community has historically devoted considerable effort to the founding and maintenance of various community welfare agencies: hospitals, nursing homes, child care agencies, day-care centers, community centers, and employment and guidance agencies. Along with traditional welfare services, some of these institutions provide the Jewish community with programs not offered in other such agencies; for example, kosher food, observance of Jewish holidays, [and] Jewish chaplains. . . . [B]y creating a distinctive Jewish ambiance in which social services are offered, these sectarian welfare agencies not only make it more likely that their service will reach and be used by all community members who need them, but also advance the organized Jewish community's stake in Jewish continuity.

American Jewish Congress, Report of Task Force on Public Funding of Jewish Social Welfare Institutions 1 (1986). This report ably describes the combination of secular service and religious accommodation that religious social welfare agencies can provide. But the report warns: "The pressing demands in recent years for social services, together with sharp increases in costs, have rendered sectarian welfare institutions unable to fulfill their increasingly expensive missions without considerable infusions of public money." *Ibid.*

Disregarding the long-standing practice of involving religious organizations along with other voluntary and charitable associations in public welfare functions, the district court held that religious organizations must be barred from publicly funded programs if those programs relate to their "religious mission" (U.S. J.S. App. 30a). The effect of this approach is to favor nonreligious organizations over religious, to create incentives for religiously affiliated organizations to drop their affiliations, and to deny beneficiaries the option of receiving the services from providers sensitive to their religious needs.

The district court obliquely acknowledged the legitimacy of religious participation in social welfare programs in a footnote (U.S. J.S. App. 22a n.12), but purported to distinguish the AFLA on the ground that it is "related to religious doctrine" (*id.* at 27a). See *id.* at 30a:

> It is a fundamental tenet of many religions that premarital sex and abortion are wrong, even sinful. . . . The AFLA does not prohibit these religions from receiving AFLA grants. Thus, by contemplating the provision of aid to organizations affiliated with these religions—aid for the purpose of encouraging abstinence and adoption—the AFLA contemplates subsidizing a fundamental religious mission of those organizations.

This argument proves too much. Virtually every activity conducted by religious organizations is related to their

"religious mission" and grows out of a commitment to their "religious doctrine." There is nothing uniquely "religious" about issues of sex and pregnancy; the Bible talks as often about caring for the poor, the widow, the orphan, and the alien as it does about sex.[9] Religious organizations should not be barred from programs to feed and house the poor merely because these advance religious objectives at the same time that they achieve the government's secular purposes. The district court's "religious mission" standard is tantamount to excluding all religious organizations from social welfare programs and effectively overrules *Bradfield v. Roberts*.

C. Inclusion of Religious Organizations in the AFLA Does Not Violate the Three-Part *Lemon* Test for an Establishment of Religion

Under this Court's precedents in the social welfare field, a government program in which financial assistance is provided to private organizations, including religious organizations, is permissible under the Establishment Clause if it satisfies three criteria. First, the program must have a legitimate, nonpretextual secular governmental purpose. Second, the distribution of funds must neither favor nor disfavor religion or religious organizations, as compared to their secular counterparts. Third, any prohibitions on religious use must be no more

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[9] See Pickrell & Horwich, *supra*, 44 Law & Contemp. P. at 112 ("The care of the indigent, the neglected, and the sick by religious organizations derives from a fundamental theological commitment to charity and "good works.") Again, the American Jewish Congress report is instructive. As it points out, hospitals, nursing homes, child care agencies, and the like perform secular functions, and aid to such services is presumably constitutional under current law. But these services are provided, in part, to "advance the organized Jewish community's stake in Jewish continuity" and to do so in a "distinctive Jewish ambiance" with provision for Jewish religious observance. American Jewish Congress, *supra*, at 1. It is not possible to draw strict lines between the sacred and the secular; what is secular from the perspective of government and law is not infrequently infused with religious significance from the perspective of the believer.

intrusive ("entangling") than is essential to serve the government's interest in ensuring that funds are devoted to the secular objective. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The AFLA satisfies each of these criteria.

This Court's precedents applying the *Lemon* test to programs of financial aid to religious organizations fall into three categories. First are cases in which the distribution of funds (or the conferring of any general benefit) is entirely neutral between religious and nonreligious participants in the program. In these cases, the program is upheld without any further restriction of the uses to which the public funds are put, and consequently without serious danger of excessive entanglement. See, *e.g.*, *Witters v. Department of Services*, 106 S. Ct. 748 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Bradfield v. Roberts*, 175 U.S. 291 (1899).

In the second category are cases in which the Court examines the character of the institutions and the uses of the funds, invalidating any grants that are used for "specifically religious purposes" or that go to institutions so "pervasively sectarian" that religious and nonreligious uses cannot be distinguished. See, *e.g.*, *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

The third category is made up of cases in which the aid recipients are found, on the basis of specific evidence and factual findings, to be "pervasively sectarian." All of these cases have involved parochial elementary and secondary schools. In these cases, pervasively sectarian organizations are prohibited from receiving any benefit that might be used or diverted for religious purposes, such as physical facilities, salary supplements, instructional equipment, maintenance grants, and on-site remedial services. The Court has reasoned that even if these

resources are not actually used for religious training and indoctrination, the monitoring needed to police these restrictions would entail "excessive entanglement" between church and state. See, *e.g.*, *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Even pervasively sectarian organizations, however, are permitted to receive so-called "self-policing" or "nonideological" forms of aid, such as transportation, school lunches, secular textbooks, off-site counseling and remedial services, standardized tests, and recordkeeping. *Committee for Public Education v. Regan*, 444 U.S. 646 (1980); *Wolman, supra*; *Lemon v. Kurtzman*, 403 U.S. at 616; *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson, supra.*

The distinction between the first and the second categories has not been fully articulated. However, all cases in the first category involve a form of aid in which the distribution of funds is genuinely and reliably neutral between religious and nonreligious beneficiaries. Many of these cases involve government assistance to individuals who choose whether to use the aid in a religious or a nonreligious environment; but some of these cases involve direct grants to service providers on the basis of objective criteria. Cases in the second category, by contrast, generally involve forms of aid that either on the face of the program or in actual operation are, or could be, skewed in favor of religious beneficiaries. The third category, logically a subset of the second, involves schemes in which the vast preponderance of aid is targeted to pervasively sectarian institutions. *Nyquist*, 413 U.S. at 785. The general principle uniting these three categories of cases is that a program is constitutional if it is genuinely and reliably neutral in its distribution of funds; otherwise, the uses of funds must be scrutinized to ensure that the effect is not to subsidize religious activity.

We contend that the judgment below must be reversed under any of the approaches used by this Court. Both the terms of the statute and the actual manner of administration require that AFLA grants are made neutrally; and grantees have been prohibited from using AFLA funds to teach or promote religion. There has been no finding that any AFLA grantee is pervasively sectarian, let alone that the preponderance of aid is targeted to pervasively sectarian organizations. Under any of the Court's approaches, therefore, the AFLA should be sustained.

1. *Under this Court's "Neutral Funding" Precedents, the AFLA Should Be Upheld on the Ground that Grants Are Made to a Wide Array of Religious and Nonreligious Organizations Under Genuinely Neutral Criteria*

a. *Purpose.*

The district court concluded from "the indisputable language of the AFLA" that its purpose was to "solve the problems caused by teenage pregnancy and premarital sexual relations." U.S. J.S. App. 19a. The program "promotes adoption, establishes innovative, comprehensive and integrated care services for pregnant adolescents, and supports research and demonstration projects concerning the causes and consequences of adolescent premarital relations." *Ibid.* There is no doubt that these matters are sensitive and value-laden, but as the district court held, they are not distinctively religious.

Much of plaintiffs-appellees' argument depends on labeling as "religious" certain beliefs and attitudes about ethics and human sexuality, despite the fact that these beliefs and attitudes can be, and are, shared by persons of many different religious persuasions or no religion at all. The view that sexual self discipline is an appropriate approach to adolescent training about sexuality, that adoption should be considered as an alternative to abortion, and that teenage pregnancy should be discouraged is not unique to religious persons. A position on

issues of human ethics does not become "religious" merely because it is consistent with the tenets of some religions.

This case is similar to *Harris v. McRae*, 448 U.S. 297 (1980), in which the appellees contended that a government program to encourage childbirth by paying the medical costs of childbirth and not those of abortion was unconstitutional because it "incorporate[d] into law the doctrines of the Roman Catholic Church." *Id.* at 319. The Court rejected this argument, observing that the program "is as much a reflection of 'traditionalist' values toward abortion, as it is an embodiment of the views of any particular religion." *Ibid.*

> [A] statute does not violate the Establishment Clause because 'it happens to coincide or harmonize with the tenets of some or all religions.' *McGowan* v. *Maryland*, 366 U.S. 420, 442 [1961]. That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.

Ibid.

Similarly, the purposes of the AFLA are as much a reflection of "traditionalist" as of "religious" values. That the purposes of the AFLA coincide with the teachings of some religions is no reason to conclude that they are impermissible under the First Amendment.[10] Accordingly, as the district court concluded, the care and prevention projects funded by the AFLA are secular services enacted for secular purposes. From the perspec-

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[10] If it were true that teaching sexual self-discipline commits the government to a position on a "religious" issue, it would be equally true that teaching artificial contraception or "safe sex" implicates the same "religious" issue. Yet plaintiffs-appellees' position appears to be that viewpoints consistent with their beliefs are "secular" while conflicting viewpoints are "religious." Only their viewpoint may be subsidized by the government. That is not neutrality.

tive of the Establishment Clause, the fact that they coincide with some religious beliefs is immaterial.

b. *Effect.*

When government provides public services or addresses public problems, it is not required to exclude religious organizations from the benefit. Churches, no less than other institutions in the community, are entitled to receive police and fire protection, to use the mails and the roads, and to have access to courts of justice. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). To cut religious organizations off from benefits otherwise available to all would constitute hostility toward religion and would in effect impose a penalty on the basis of belief in violation of the Free Exercise Clause. It is fully in keeping with the First Amendment for the government to "facilitate the existence of a broad range of private, non-profit organizations, among them religious groups." *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

Neutrality is the key. While government may not provide benefits for the purpose of promoting religion, it need not withhold benefits merely because there will be a benefit to religion. Rather, any benefit to religion is permissible if it is strictly "incidental"[14] to the overall sweep of the program; the test is whether the benefit would be extended even if the beneficiary were not religious.[12]

This Court has applied this neutrality test in many cases, involving a wide variety of social programs. We have already discussed *Bradfield v. Roberts*, 175 U.S. 291, 299 (1899), in which the Court declared "wholly

[11] *Roemer*, 426 U.S. at 747; *Committee for Public Education v. Nyquist*, 413 U.S. 756, 771 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973).

[12] An exception to this principle is that a religion-specific accommodation may be permissible if needed to protect religious freedom. See *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862, 2867 (1987).

immaterial" the religious affiliation of a hospital that received federal funds. Since the purpose of the government aid was to provide health care and there was no suggestion that the particular hospital was chosen because of its religious affiliation, there was no reason to treat the hospital any differently than any other grantee under the program.

In *Witters v. Department of Services*, 106 S. Ct. 748 (1986), a unanimous Court held that public funds could be used to pay the tuition of a student at the Inland Empire School for Bible, an intensely religious institution at which he chose to study for the ministry. Notwithstanding the ultimate religious use of the funds, the Court upheld the program because the funds were distributed neutrally to a defined class of eligible individuals for vocational training.

Justice Marshall's opinion for the Court stated that the neutrality of the funding scheme was "central to our inquiry." 106 S. Ct. at 752. The "program is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,' and is in no way skewed toward religion." *Ibid.* (citation omitted). The Court explained that the program "does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions." *Ibid.* Justice Powell, joined in substantial part by four other Justices, expressed the controlling principle as follows: "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon* v. *Kurtzman* test." *Id.* at 754 (concurring opinion); accord, *id.* at 753 (White, J., concurring); *id.* at 755 (O'Connor, J., concurring).

Because the funding formula in *Witters* was entirely neutral between religious and nonreligious beneficiaries, the Court inquired no further into the uses to which the

publicly-funded tuition money would be put. Indeed, the record showed that the tuition would go toward such obviously religious uses as training in "bible" and in "church administration." 106 S. Ct. at 750. Neutrality was achieved through even-handed distribution of public resources, not through an insistence that every participating institution secularize itself. The constitutional objective of religious pluralism is frustrated if, as a condition to participating in otherwise neutrally available benefits, a religious organization is forced to purge itself of its religious character.[13]

In *Witters*, the neutrality of the funding formula was guaranteed because the decision whether to use the tuition grant in a religious or a nonreligious institution was made by the individual student rather than the government. "Any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 106 S. Ct. at 752. But as the Court made clear, the form of the transaction is not decisive. Some forms of aid may have the effect of a subsidy to religion "even though it takes the form of aid to students or parents." *Ibid.* (citing *Grand Rapids School District*, 473 U.S. at 394); accord, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 781 (1973); *Grove City College v. Bell*, 465 U.S. 555, 564-65 (1984). The decisive point is not how the aid is distributed as a formal matter, but whether the distribution of funds is genuinely neutral.

Witters is the most recent of a long line of cases in which aid distributed neutrally to religious and nonreligious organizations alike has been sustained without

[13] This is not to say that the government is forbidden to require that a grantee does not divert public funds from statutory to religious purposes, as the Secretary has done in the AFLA program. But for the government to go the additional step of requiring the organization to alter its own character or affiliation, or secularize the ways it uses its own funds, would defeat the pluralistic purposes of the First Amendment. Cf. *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984).

examination into whether the uses to which the aid is put are religious. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a Minnesota program of tax deductions for parents' expenses incurred in obtaining education for the children. The large part of these expenses were tuition payments to private schools, most of which were religious schools. *Id.* at 400-01. As in *Witters*, the decisive consideration was the neutrality of the funding formula. "Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian schools." *Id.* at 397 (emphasis in original). The program therefore was consistent with the Establishment Clause, notwithstanding the fact that tuition to parochial schools undoubtedly paid for religious instruction.[14]

In *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981), the Court held that it would not violate the Establishment Clause for a state university to make its facilities available, without payment, to a religious group on an equal

[14] Unlike *Witters*, which was unanimous, the Court was closely divided in *Mueller*. The disagreement, however, turned on whether the funding formula in *Mueller* was genuinely neutral, not on whether a genuinely neutral program would be constitutional. Thus, Justice Marshall's dissenting opinion stressed that the "vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools." 463 U.S. at 405. The majority, by contrast, was "loath" to allow the constitutionality of the program to depend on evidence regarding the actual incidence of the benefit. It preferred to base the decision on the facial neutrality of the statute. *Id.* at 401. A similar methodological disagreement divided the otherwise unanimous Court in *Witters*. Compare 106 S. Ct. at 752 (opinion for the Court by Marshall, J.), *with id.* at 754 n.3 (Powell, J., concurring). For purposes of this case, the question dividing the Court in *Mueller* and *Witters* is immaterial. As discussed more fully below, the AFLA's funding formula is neutral on its face, and in practice fewer than 25% of the grantees have been religiously affiliated. Under either methodology, the AFLA is genuinely neutral between religious and nonreligious participants.

basis with other university student groups. Free facilities are, of course, a valuable benefit; and the group intended to use this benefit for core religious purposes, including religious teaching, worship, and prayer. The Court reasoned, however, that when benefits of this sort are open to all on a neutral basis, there is no effect of "advanc[ing] religion." *Id.* at 273. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Id.* at 274.

In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court sharply differentiated between programs in which aid flows to "*all* schoolchildren" (*id.* at 782 n.38 (emphasis in original)) and those in which aid is restricted to those who choose to attend private schools, which are overwhelmingly sectarian. The Court suggested, in dictum, that it would approve of a genuinely neutral aid program like the "G.I. Bill." *Ibid.* This dictum became holding in two summary affirmances: *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), *aff'd*, 434 U.S. 803 (1977); *Smith v Board of Governors*, 429 F. Supp. 871 (W.D.N.C.), *aff'd*, 434 U.S. 803 (1977).

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), the Court held, with only one dissent, that state property tax exemptions for religious organizations are permissible, even when the property is used "solely for religious worship." *Id.* at 666. Emphasizing the constitutional principle of "neutrality" (*id.* at 669), the Court noted that the tax benefit was provided to churches, "within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673. As Justice Brennan stated in concurrence: "Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." *Id.* at 689.

In sum, the key factor under this Court's cases is that "the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh v. Chambers*, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting). If a government program is genuinely neutral—if it distributes its benefits neutrally to religious and nonreligious organizations alike—then it satisfies the second criterion of the *Lemon* test, without further need for inquiry into how the funds are spent.

The AFLA is constitutional on this ground. Congressional policy, reflected in the AFLA as well as countless other statutes, holds that grantees should be representative of the broad spectrum of private associations in the field. In enacting the AFLA, Congress expressly found that issues of adolescent sexuality and pregnancy are "best approached through a variety of integrated and essential services provided . . . by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives." 42 U.S.C. 300z(a)(8)(B).

Religious organizations are neither favored nor disfavored by the AFLA; they are merely included among the wide array of private and governmental organizations that may be involved in the program. As the Senate Report states: "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, at 15-16.

In four places in the statute, the AFLA refers to religious organizations; in all four the reference is to a variety of community organizations ("religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services sponsored

by publicly sponsored initiatives"). 42 U.S.C. §§ 300z(a)(8)(B), (10)(c), 300z-5(a)(21); see *id.*, § 300z-1(a)(3) ("'eligible grant recipient' means a public or nonprofit private organization or agency"). The AFLA "encourages" the involvement of the family and the community, and names "religious organizations" as only one of several community resources that might be used. "The very breadth of this scheme . . . negates any suggestion that [Congress] . . . intends to single out religious organizations for special preference." *Walz*, 397 U.S. at 689 (Brennan, J., concurring).[15]

The changes Congress made in the old Title VI program when enacting the AFLA do not indicate any intention to favor religion. As the district court noted, "Title VI was amended not only to add religious organizations to the list of entities that may participate in AFLA programs, but also to add families, charitable organizations, voluntary associations and other groups." U.S. J.S. App. 21a. Moreover, even under Title VI, religious organizations were eligible to participate, and did participate, in the program. S. Rep. 97-161, *supra*, at 16.

The record shows that government officials charged with selecting grantees did so without regard to religious affiliation. J.A. 781-83. Grant applicants were ranked according to objective, secular criteria bearing on their probable effectiveness in accomplishing the statutory purposes. The record shows that fewer than 25% of the grantees in the AFLA program have been religiously affiliated. J.A. 748-56. This demonstrates that administration of the program "is in no way skewed towards religion." *Witters*, 106 S. Ct. at 752.

[15] Section 300z-5(a)(21) states that applications for AFLA grants "shall include" a "description of how the applicant will, as appropriate in the provision of services . . . involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services sponsored by publicly sponsored initiatives." This section does not require the participation or funding of religious organizations in each and every grant. Rather, it suggests that grantees should seek to involve community groups and that religious organizations are among them.

That the AFLA involves direct grants to religiously affiliated organizations rather than grants to individual beneficiaries, as in *Witters* and *Mueller*, is not decisive. To be sure, when aid flows to religious institutions "only as a result of the genuinely independent and private choices of aid recipients" (*Witters*, 106 S. Ct. at 752), this is an excellent proxy for neutrality. As this Court has frequently observed, however, the "economic effect of direct and indirect assistance often is indistinguishable." *Grove City College v. Bell*, 465 U.S. 555, 565 (1984); see *Witters*, 106 S. Ct. at 752; *Grand Rapids*, 473 U.S. at 394; *Mueller*, 463 U.S. at 397 n.6; *Nyquist*, 413 U.S. at 783; *Norwood v. Harrison*, 413 U.S. 455, 463-65 (1973). Thus, "indirect assistance" has been held unconstitutional when it is not genuinely neutral. *Sloan v. Lemon*, 413 U.S. 825 (1973); *Nyquist*, 413 U.S. at 780-94. More importantly for present purposes, direct grants to religiously affiliated institutions were upheld without scrutiny into use in *Bradfield v. Roberts*, 175 U.S. 291 (1899). *Bradfield* has been the governing precedent for judicial evaluation of aid to social welfare programs outside the field of education for almost a century. To require particularized scrutiny of the uses of public money in the social welfare field, with all the "entanglement" that entails,[16] would seriously disrupt a settled and essentially noncontroversial area of constitutional law.

By including religious as well as nonreligious participants, Congress both procures the services of the best qualified grant applicants, without regard to religion, and gives families a broader range of choice in the style and philosophy of service agencies. Congress found, for example, that projects for the benefit of "hispanic and other minority populations are more accepted by the population if they include sectarian, as well as nonsectarian organizations in the delivery of those services." S. Rep.

[16] See pages 30-32, 43-44, *infra*.

98-496, *supra*, at 10. As with other social welfare activities, religious organizations are in a position to make a valuable contribution toward the purposes of the AFLA. Indeed, before the AFLA was enacted, religious as well as other voluntary and charitable groups were providing homes for unwed mothers, adoption services, maternity health clinics, and programs for family involvement in adolescent sexual awareness. See 42 U.S.C. 300z-4(a)(4). There is no reason why government entry into the field should have to *reduce* the diversity of service providers.

c. *Entanglement.*

This Court has held that a program of financial assistance to religious organizations can be unconstitutional, even when it is secular in purpose and neutral in effect, if it entails an "excessive entanglement" between religious and governmental authorities. *Lemon*, 403 U.S. at 613; see *Aguilar v. Felton*, 473 U.S. 402 (1985). The classic example of "excessive entanglement" is *Lemon* itself. Under the salary subsidy program in that case, the teacher, who was "employed by a religious organization, subject to the direction and discipline of religious authorities, and work[ed] in a system dedicated to rearing children in a particular faith," *id.* at 618, was simultaneously subjected to governmental monitoring to ensure against the "impermissible fostering of religion." *Id.* at 619. This clash of inconsistent obligations created "the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." *Id.* at 620.

The "entanglement" analysis of *Lemon* has proven fatal to a financial aid program only when two conditions are present: (1) where the "effects" analysis requires that the government ensure that aid is not used for specifically religious purposes, and (2) where the aid flows to a "pervasively sectarian" organization. In contrast, neutral funding formulas are, virtually by definition, nonentangling. When the requirement that the effects of a program neither advance nor inhibit religion is

achieved through neutrality at the level of the distribution of funds, as in *Witters*, *Mueller*, and *Walz*, there is no constitutional need to monitor the uses to which the funds are put.[17] Consequently, there is no "entanglement" problem, unless there is some other aspect of the administration of the program, not present here, that causes it. See *Mueller*, 463 U.S. at 403.[18] The entanglement analysis thus has never played an important part in this Court's first category of cases. If, as we contend, the AFLA should be upheld on the basis of its neutral distribution of funds, the "entanglement" issue need not even arise.

The "excessive entanglement" analysis of *Lemon* has frequently been criticized by members of this Court. *Aguilar*, 473 U.S. at 427-30 (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 109-10 (1985) (Rehnquist, J., dissenting); *Lemon*, 403 U.S. at 665-71 (White, J., dissenting). We believe that this case does not call for a reexamination of the "entanglement" doctrine, since the district court must be reversed under a routine application of current doctrine.

Should the Court wish to reexamine the "entanglement" doctrine, however, we would point out that intrusive government monitoring of religious functions presents more a free exercise than an establishment problem. See *Aguilar*, 473 U.S. at 410 ("the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters"); *Lemon*, 403 U.S. at 670 (White, J., dissenting) (issue is whether "enforcement measures would be so extensive as to border on a free exercise violation"); *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). Accordingly, it is questionable whether third

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[17] See pages 23-24, *supra*.

[18] More precisely, in these cases the "entanglement" that occurs as a result of the aid is less than the "entanglement" that would occur if the government attempted to distinguish between religious and nonreligious uses. *Walz*, 397 U.S. at 674-76. See also *Widmar*, 454 U.S. at 272, n.11.

parties, like plaintiffs-appellees, properly have standing to raise the free exercise interests of AFLA grantees, their opponents in the litigation. Perhaps the better approach is for lawsuits of this sort to determine only what restrictions on funding are necessary under the "effects" analysis, leaving it to the grantees to challenge excessively intrusive monitoring schemes under the Free Exercise Clause.

2. *Alternatively, Under this Court's Second Category of Cases Applying the* Lemon *Test, the AFLA Should Be Upheld Insofar As Funds Have Been Used for Legitimate Statutory Purposes By Organizations That Are Not Pervasively Sectarian.*

a. *Purpose.*

The Court's second category of financial aid cases does not differ from the first in its analysis of legislative purpose. For reasons discussed above, the AFLA is unobjectionable on this score.

b. *Effect.*

The principal differences between the first and second categories of cases lie in the "effect" and "entanglement" parts of the *Lemon* test. In the second category, the Court upholds aid to religious organizations, so long as they are not "pervasively sectarian" and are prohibited from using the aid for specifically religious activities.

This approach is described in *Hunt v. McNair*, 413 U.S. 734 (1973), *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (plurality opinion), and *Tilton v. Richardson*, 403 U.S. 672 (1971) (plurality opinion). As these decisions demonstrate, mere religious affiliation is not sufficient to disqualify an organization from participation in a government-funded program. Instead, this Court has carefully distinguished between "pervasively sectarian" organizations, in which religious and other activities are "inextricably intertwined" (*Lemon v. Kurtzman*, 403 U.S. at 657) and other religious organizations,

which are "not 'so permeated by religion that the secular side cannot be separated from the sectarian.'" *Roemer v. Board of Public Works*, 426 U.S. at 759. *Compare Meek v. Pittenger*, 421 U.S. 349, 356 (1975), *with Roemer*, 426 U.S. at 755-59; and *Tilton*, 403 U.S. at 686-87. Organizations that are religious, but not "pervasively sectarian," are eligible for participation in publicly-funded programs on an equal basis with secular institutions, on the condition that they refrain from using the funds for "specifically religious activity." *Hunt v. McNair*, 413 U.S. at 743; *Roemer*, 426 U.S. at 759.

The AFLA program satisfies these standards. Congress has clearly stated its intention that program funds not be used for religious purposes. The Senate Report states that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation." S. Rep. 98-496, *supra*, at 10. In accordance with this directive, the Secretary has attached the following restriction to the Notice of Grant Awards:

> 7. The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally.

J.A. 757, 759, 761 (grant conditions for 1984-86). This formal proscription was bolstered by oral warnings issued to grant applicants that the promotion of religion was prohibited. J.A. 783-84. Moreover, these restrictions have teeth: On at least three occasions, grantees were warned that their prospective activities might be in violation of the grant restrictions (J.A. 671-72, 673-74, 675-76), and one grantee was dropped from the program for violation of the condition. J.A. 742-43.

The AFLA grant conditions are similar to those attached to most federal grant projects. See, *e.g.*, 20 U.S.C. 1021(c) (grants to college and research libraries may not be used for materials "for sectarian instruction or religious worship"); 29 U.S.C. 776(g) (federally-funded

handicapped rehabilitation facilities may not be "used for religious worship or any sectarian activity"); 42 U.S.C. 3027(a)(14)(A)(iv) (federally-funded senior center "will not be used and is not intended to be used for sectarian instruction or as a place for religious worship"); 24 C.F.R. 575.21 (conditions on grants to homeless shelters owned by "primarily religious organizations").

The AFLA grant restriction against teaching or promoting religion does not mean that grantees are forbidden to teach or promote practices which the AFLA is intended to promote, such as sexual self-discipline or adoption, even though these accord with the religious tenets of some religions. Secular laws dealing with adolescent pregnancy, like those against stealing, embody moral values that are not distinctively religious. Although most religions oppose stealing, the government may enact laws prohibiting stealing and may fund efforts to discourage it. The secular value against stealing would not magically turn into "religion" merely because it is promoted by a religious organization. If this were so, the state could *never* "send a cleric" to do a secular task (*Roemer*, 426 U.S. at 746) because the secular task would become the "advancement of religion" when undertaken by the cleric. As discussed above,[19] the purposes of the AFLA accord with "traditionalist" as nearly as they do with "religious" thinking. If promotion of the AFLA objectives is a secular purpose under the first part of the *Lemon* test, then it cannot be a "specifically religious" activity proscribed under the second part.

The district court ignored the AFLA grant restrictions on the ground that they were imposed administratively rather than by statute or regulation. U.S. J.S. App. 29a n.13. The court stated that the religious use restriction is "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agency fiat." *Ibid.* This holding is inconsistent with the law pertinent to federal grants. Grant agreements and grantor instructions are legally binding upon grantees and are enforced by audit recovery. See Comptroller General, Standards for Audit of Governmental Organizations, Programs, Activities & Functions 28 (1972); R. Cappalli, Federal Grants and Cooperative Agreements, § 6:14 (1982).[20] Grant conditions imposed by the agency, unless inconsistent with the statute, are fully authoritative and binding on the grantee. The constitutionality of a federal program does not depend upon whether grant restrictions are composed by Congress or by the agency pursuant to delegated authority.

[19] See pages 20-21, *supra*.

Nor is it significant that administrative restrictions "can be revoked by agency fiat" (U.S. J.S. App. 29a n.13). In the unlikely event that the restrictions are revoked, that will precipitate a new lawsuit to challenge future grants. As long as the restrictions are in effect, the remote possibiilty of their future revocation does not make the program, as it is now constituted, unconstitutional.[21] Indeed, even if the Secretary had not imposed the prohibition on teaching or promoting religion, the proper remedy would not be to invalidate an Act of Congress, but to enjoin the Secretary to administer the statute in accordance with the Constitution. *Aguilar v. Felton*, 473 U.S. 402, 408 n.7 (1985); *Tilton*, 403 U.S. at 682-84.

The district court's findings on the characteristics of the AFLA grantees are insufficient to support a judg-

[20] The grant restriction quoted in the text is only one of 12 restrictions imposed on AFLA grantees by administrative action, including important financial and program accountability standards. See J.A. 757-68. It would severely disrupt the administration of the program for the courts to hold that such restrictions are not legally enforceable.

[21] Even if the restrictions on teaching or promoting religion were revoked in the future, the grants under challenge in this case —those for Fiscal Years 1987 and prior—would be governed by the standards in effect at the time. *Bennett v. New Jersey*, 470 U.S. 632 (1985). That remote contingency therefore cannot affect this lawsuit.

ment that the Act is unconstitutional. Each of the determinations required under *Roemer* and *Hunt*—whether a participant is pervasively sectarian and whether grant funds are used for a specifically religious purpose—must be made with particularity. As Chief Justice Burger stated for the plurality in *Tilton*, 403 U.S. at 682:

> Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics.

See also *Roemer*, 426 U.S. at 761; *Hunt*, 413 U.S. at 744; *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974); cf. *United States v. Salerno*, 107 S. Ct. 2095, 2100 (1987). This is especially true where, as in this case, the characteristics of the various religiously-affiliated grantees vary so dramatically, from hospitals, to civic and athletic clubs, to adoption agencies, to distinguished universities. Each of the affected grantees is different; the religious involvement ranges from purely nominal to more substantial. It is not possible to resolve these issues on the basis of sweeping generalizations.

The district court made no findings sufficient to disqualify any grantee from the AFLA. More importantly, no findings of the court could conceivably justify eliminating *all* religiously affiliated organizations from the program, without evidence that they have violated their grant agreements. Out of 23 religiously affiliated grantees, the court made reference in its opinion to only 13, of which 4 are state or local government agencies. J.A. 758-59. Eliminating the remaining grantees, solely on the basis of religious affiliation, is unprecedented, unwarranted, and inconsistent with the Free Exercise Clause. An organization that has been selected as the best possible grantee on the basis of objective, secular criteria and that has not been found to have used any of the grant funds for religious purposes cannot be denied the benefits of participating solely because of its religious affiliation.

Even as to those grantees discussed in the district court's opinion, the court applied an erroneous legal standard. If the Court concludes the AFLA should be analyzed under this second category of cases, rather than as involving a neutral funding formula, on remand the district court should apply this Court's precedents regarding pervasively sectarian organizations and use of funds for specifically religious purposes.

(1) *Pervasively sectarian grantees.* The district court did not even purport to apply this Court's standard for determining whether a grantee is pervasively sectarian. U.S. J.S. App. 24a-25a.[22] The court used the term, "pervasively sectarian," only twice in the relevant section of its opinion, neither time in reference to any particular grantee. See U.S. J.S. App. 33a, 36a. Contrast *Grand Rapids*, 473 U.S. at 394, n.12 ("In this case, the District Court explicitly found that 40 of the 41 participating nonpublic schools were pervasively religious" under the definition in *Hunt*). Here, the district court instead excluded from participation in the program all "religious organizations"—a far broader category. See *id.* at 33a, 54a-55a. The court stated (*id.* at 32a-33a):

> These facts reveal that AFLA grantees and subgrantees have included several organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by

[22] The district court acknowledged that its refusal to do so was based on an "analysis" not found in this Court's cases. U.S. J.S. App. 25a. This "analysis" is that when the involvement of religious participants is "apparent on the face of the statute" this Court's precedents, such as *Hunt v. McNair*, *supra*, do not apply. *Id.* at 24a. The effect is to apply different constitutional standards to identical (and identically *neutral*) programs, solely on the basis of different statutory language. For example, the multipurpose senior center program expressly mentions "churches" as appropriate locations (42 U.S.C. 3027(a)), while the hospital construction and modernization loan program refers more generally to "nonprofit private agencies" (42 U.S.C. 291j-3(a)). Under the district court's novel analysis religious (other than pervasively sectarian) organizations could participate in the latter, but not the former. There is no reason in logic or practice for this distinction.

and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them.

That some grantees have "institutional ties to religious denominations" is obviously insufficient to establish that they are "pervasively sectarian." See *Hunt*, 413 U.S. at 746 n.8 (the party challenging the program "failed to show more than a formalistic church relationship"). Among the AFLA grantees are organizations with such formalistic institutional ties to religion as the YWCA [23] and Emory University [24]—not to mention the very institution at issue in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899).[25] If all organizations with a religious affiliation, however tenuous, must be barred from publicly-funded programs, this would work a revolution in the conduct of American social welfare.

The description of the religious colleges in *Roemer* demonstrates that an organization may have a substantial religious component to its activities without becoming "pervasively sectarian" under this Court's definition. These colleges were formally affiliated with the Roman Catholic Church, with the Church officially represented on their governing boards; they employed Roman Catholic chaplains, held religious services, and "encourage[d] . . . spiritual development"; they required religion and theology courses for their students; they opened some—in one case a majority—of their classes with prayer; some of their classrooms contained religious symbols and some instructors wore clerical garb. 426 U.S. at 755-56. Nonetheless, the Court held that these colleges were not

[23] J.A. 499-500, 506-08, 772.

[24] Emory University is affiliated with the Methodist Episcopal Church, South. J.A. 504.

[25] See J.A. 440 (discussing the Providence Center for Life, a unit of the Providence Hospital of Washington, D.C., the hospital involved in *Bradfield*).

"pervasively sectarian" and could receive public aid. See also *Hunt*, 413 U.S. at 743-45; *Tilton*, 403 U.S. at 686-87. Indeed, the only institutions this Court has found to be "pervasively sectarian" are parochial elementary and secondary schools, which this Court has singled out as uniquely and specifically "devoted to the inculcation of religious values and belief," an objective which is " 'the only reason for the schools' existence.' " *Meek v. Pittenger*, 421 U.S. at 366 (quoting *Lemon*, 403 U.S. at 657) (Brennan, J., concurring)). See also *Aguilar v. Felton*, 473 U.S. 402, 411, 412 (1985).

None of the grantees in this case has been shown to be more pervasively sectarian than the colleges in *Roemer*, *Hunt*, and *Tilton*. Indeed, the grantees conspicuously lack most of the characteristics recently mentioned by this Court as distinguishing pervasively sectarian institutions: none of the AFLA grantees "include prayer and attendance at religious services as part of their curriculum"; none have "student bodies composed largely of adherents of the particular denomination"; and none "give preference in attendance to children belonging to the denomination." [26] *Grand Rapids*, 473 U.S. at 384, n.6. Perhaps on remand one or more grantees will be disqualified on this standard, but the district court made no such findings.

In addition to its focus on mere "institutional ties," the district court looked to whether grantees have "corporate requirements that the organizations abide by and not contradict religious doctrines." U.S. J.S. App. 33a. We object strenuously to using this as a basis for exclusion. Unless an organization's obedience to religious doctrine interferes in some way with its ability to fulfill the program's secular objectives, the organization has the right under the Free Exercise Clause to observe religious doctrine without suffering a financial penalty.

[26] Indeed, the grantees are expressly required to make their programs available to the public generally. J.A. 757, 759, 761 (Condition No. 7).

Sherbert v. Verner, *supra*. The only examples the court mentioned of organizations that enforce religious doctrines are some that do not assist in abortions or artificial contraception. These limitations merely echo restrictions imposed by Congress itself;[27] they can hardly be said to interfere with the grantee's ability to perform its statutory functions.

Finally, the district court's notion that an organization "without discernable [sic] religious ties" (U.S. J.S. App. 35a) can (and must) be excluded from the AFLA because its founders were "religiously inspired" (*id.* at 33a) is frighteningly hostile to religious belief. It is one of the central tenets of our constitutional creed that all citizens must be treated equally by our government, without regard to their religious beliefs or lack of them. See *McDaniel v. Paty*, 435 U.S. at 626-27; *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). In its concern for achieving pristine secularism in the AFLA program, the district court lost sight of the wider, and more important, issues of religious freedom that lie at the heart of the First Amendment. Once again, the issue should be whether a grantee can live up to the objective, secular criteria of the program, including the prohibition on religious uses—not whether its founders' inspiration comes from the gospels, the Torah, or *Humanae Vitae*.

In no instance did the district court evaluate whether a grantee was capable of separating secular from sectarian activities. Accordingly, its decision that all religiously-affiliated organizations must be barred from the program should be reversed.

(2) *Specifically religious activities.* Nor did the district court establish that any of the AFLA grantees have violated the terms of the grant by using AFLA funds to teach or promote religion. The instances of alleged mis-

[27] The AFLA generally prohibits grantees from using funds "for the provision of family planning services" (42 U.S.C. 300a-3(b)(2)) and for abortions or abortion referrals (42 U.S.C. 300a-10(a)).

conduct recited in the opinion (U.S. J.S. App. 33a-38a) turn out, on closer inspection, to be more smoke than fire.

The court's first example is St. Margaret's Hospital, a religiously-affiliated hospital. U.S. J.S. App. 33a-34a. St. Margaret's infraction is that it told an AFLA-funded employee that he had to conform to the institution's "Ethical and Religious Directives." As discussed above, this is the hospital's prerogative and constitutional right, and can be objectionable only if the ethical and religious directives conflict in some way with the AFLA's secular purposes.

A similar charge is laid against St. Ann's Infant and Maternity Home, a Roman Catholic institution, whose religious standards duplicate the secular standards set forth in the AFLA itself. U.S. J.S. App. 34a.[28] The court also noted that some of St. Ann's AFLA projects "are directed by members of religious orders," a circumstance that, in itself, has been held by this Court to be constitutionally unobjectionable. *Roemer*, 426 U.S. at 757; see *id.* at 746 ("It has long been established, for example, that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task"); *Bradfield*, 175 U.S. at 298 ("the fact that [the hospital's] members . . . are members of a monastic order or sisterhood . . . is wholly immaterial").

Finally, the court stated that St. Ann's AFLA programs "base their curriculum on materials with explicitly religious content." U.S. J.S. App. 34a. One has to read this statement several times, very carefully, in conjunction with the accompanying footnote 15, to understand it. The court did not find that the curriculum used in the AFLA project *contains* any religious material—just that the curriculum was "based on" materials with religious content. The footnote explains that "there is a dispute as to whether this religious material was taught, but there is no dispute that the curriculum that was taught was at least based on these materials,

[28] See note 27, *supra*.

which spoke in terms of Church teachings on sexual matters and contained several references to God." *Id.* at 34a n.15. Since this case was decided in favor of plaintiffs-appellees on summary judgment, any factual dispute must be resolved in favor of the parties opposing the motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In other words, the district court was required to assume that *no religious materials were actually taught.* In fact, the record shows that St. Ann's complied with the Notice of Grant Award by removing references to God and to church teachings from the curriculum before using it in the AFLA project. J.A. 441.[29]

The most troubling alleged infractions mentioned by the district court were a grantee that included "spiritual counseling" in its AFLA program and one that allowed a cleric to follow up an AFLA presentation with a presentation of religious views on the same subject. U.S. J.S. App. 36a, 37a. What the court did not point out is that the proposal for spiritual counseling was *rejected* by the Secretary as "*not legally permissible*" (J.A. 676, emphasis in original), and the clerical presentation was by a grantee, Catholic Charities of the Diocese of Arlington, that was subsequently barred from the program for violation of the Notice of Grant Award. J.A. 742-43.

The court also observed that "the overwhelming number of comments shows that program participants believed that these federally funded programs were also sponsored by the religious denomination," stating that "[t]his appearance of joint action provides a significant symbolic benefit to religion." U.S. J.S. App. 37a, 38a. It is difficult to know where this argument leads. Presumably, patients at the hospital in *Bradfield* and students at the colleges in *Tilton*, *Hunt*, and *Roemer* believed that the facilities were "also sponsored" by the religious institutions that were grantees in those cases. Indeed, *whenever* the government accomplishes its purposes by making a grant to a private organization it will create the (quite accurate) "appearance" that the project is a joint effort between the grantee and the government. If this is a test of unconstitutionality, no religious organization can ever be a grantee in any government program.

[29] St. Ann's also stopped distributing certain books to AFLA participants upon warning from HHS. J.A. 673-74.

This Court need not review each of the district court's factual findings in detail. The point is simply that the findings, taken individually and as a whole, are insufficient to justify striking down the entire program. We are fully in agreement that any grantees that are found to violate the terms of the grant should be disciplined and, in appropriate cases, excluded. The innocent, however, should not be punished along with the guilty. Religious affiliation is not a constitutionally permissible basis for imposing guilt by association.

c. *Entanglement.*

The second category of this Court's cases (no specifically religious uses or pervasively sectarian grantees) also differs from the first (neutral distribution of funds) in that the issue of "excessive entanglement" becomes significant. Because of the need for monitoring the uses to which government funds are put, there arises a danger of church-state conflict. The only context in which this conflict has been held to be so "excessive" that it can invalidate an otherwise neutral program, however, has been where "comprehensive, discriminating, and continuing state surveillance" is required of pervasively sectrian institutions. *Lemon*, 403 U.S. at 619. This Court has never struck down a program of aid that passes the first two parts of the *Lemon* test on "entanglement" grounds unless the organization involved has been found to be pervasively sectarian.

There are two reasons why the "entanglement" analysis does not apply with full force to religiously affiliated organizations that are not "pervasively sectarian." First, the grant agency and reviewing court can be much more confident that aid given for secular purposes will be used

for those purposes. As the Court noted in *Roemer*, where the grantee is not pervasively sectarian there is a "substantially reduced danger" that "an ostensibly secular activity . . . will actually be infused with religious content or significance." The "need for close surveillance of purportedly secular activities is correspondingly reduced." *Id.* at 762. Indeed, in such cases the reviewing court will "assume that the [grantees] will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate." *Roemer*, 426 U.S. at 755, 760. See also *Hunt v. McNair*, 413 U.S. at 746; *Tilton*, 403 U.S. at 687.

Second, and more fundamentally, government surveillance of the secular components of religiously affiliated organizations is not as much an "intrusion into sacred matters." *Aguilar*, 473 U.S. at 410. For government to monitor the activities of persons under church discipline, dedicated to the core religious functions of the organization, presents a direct clash between competing authorities: "entanglement" is almost too soft a word. For government to monitor the activities of a separable secular unit of a religiously affiliated organization does not present the same problem; the organization stands in no different position than any other grantee. Thus, the monitoring required of organizations that are not pervasively sectarian is both less intensive and less objectionable than the monitoring of pervasively sectarian grantees. Religious organizations can and should be subject to the same degree of monitoring imposed upon any other grantee to ensure that grant funds are used exclusively for statutory purposes.

As noted above, the district court did not determine which, if any, of the AFLA grantees are pervasively sectarian.[30] The district court therefore erred in holding that grants to religious organizations under the Act violate the "entanglement" prong of the *Lemon* test.

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[30] See pages 37-40, *supra*.

3. *The District Court Misapplied This Court's Precedents Regarding Aid to Parochial Schools*

The district court's opinion relies entirely on cases falling into this Court's third category: those involving aid that is targeted to pervasively sectarian parochial elementary and secondary schools. The court did not so much as attempt to distinguish cases like *Witters* or *Bradfield*. Since the AFLA involves aid that is distributed neutrally to religious and nonreligious organizations of varying descriptions, the court's selective reliance on the parochial school cases is highly misleading.

In the parochial school cases relied on by the district court, the vast preponderance of aid goes (and is specifically tailored to go) to religious institutions. See *Grand Rapids*, 473 U.S. at 384; *Aguilar*, 473 U.S. at 411-12; *Nyquist*, 413 U.S. 756, 782 n.38, 794 (1973). As this Court stated in *Sloan v. Lemon*, 413 U.S. 825, 832 (1973) (emphasis in original):

> The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children.[31]

Parochial school aid is thus easily distinguishable from the AFLA, where only a small part of the aid goes to religious organizations. The AFLA provides neither "incentive" nor "reward" for religious choices; it is simply

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[31] Early on, the Court rejected the argument that aid to parochial schools is a neutral effort to provide benefits to private schoolchildren comparable to the free education given to public schoolchildren. *Nyquist*, 413 U.S. at 782 n.38; cf. *id.* at 803 (Burger, C.J., dissenting).

neutral. See *Witters*, 106 S. Ct. at 752; *Walz v. Tax Commission*, 397 U.S. at 689 (Brennan, J., concurring).

A second ground of distinction is that parochial school aid cases are expressly premised on actual factual findings that the schools involved are pervasively sectarian, within this Court's definition of that term. See, *e.g.*, *Grand Rapids*, 473 U.S. at 384-85. No such finding has been made here.

A third ground of distinction is that parochial elementary and secondary schools are designed to create a total environment in which religious teachings are made a part of the student's ordinary life. See *Grand Rapids*, 473 U.S. at 379 (quoting a parochial school's statement of its goal to create a "God oriented environment which *permeates* the total educational program" (emphasis in original)). Most AFLA programs consist in comparatively brief encounters, devoted to a single purpose. There is little opportunity for the development of long-term relationships, no danger of the teenagers confusing the AFLA program with surrounding religious schooling, and no design to inculate religious doctrine.

In using the parochial school aid precedents in this case, the district court has dramatically changed the rules of the game in the social welfare field, which had remained settled since *Bradfield* almost a century ago. For a variety of reasons, aid to parochial schools had been an especially sensitive and divisive issue, and the standards applied in that context have been especially stringent. *Grand Rapids*, 473 U.S. at 383. The stringent tests developed for parochial school aid have never been applied by this Court in any other context.

In particular, the Court has distinguished between aid to the educational functions of religious institutions and aid to their health and welfare functions. See *Wolman v. Walter*, 433 U.S. 229, 244 (1977) (plurality opinion per Blackmun, J.); *id.* at 259 (Marshall, J., concurring in part); *id.* at 266 (Stevens, J., concurring in part);

Lemon v. Kurtzman, 403 U.S. at 644 (Douglas, J., concurring in part); see also *Bradfield v. Roberts*, *supra*.[32] Justice Marshall has explained:

> General welfare programs, in contrast to programs of educational assistance, do not provide '[s]ubstantial aid to the educational function' of schools, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in *Meek*. Moreover, because general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.

Wolman, 433 U.S. at 259-60 (concurring and dissenting opinion) (citation and footnote omitted).

The district court therefore erred in relying exclusively on the parochial school cases. But even assuming that some AFLA grantees (those found on remand to be pervasively sectarian) must be accorded the same constitutional treatment as the parochial schools, the court further erred in failing to distinguish between the various types of services provided by grantees under the AFLA. This Court has repeatedly held that services that offer no opportunity for religious indoctrination, but serve an important social welfare function, may be provided at public expense even by pervasively sectarian institutions like parochial schools. *Lemon*, 403 U.S. at 616-17. These services include transportation, textbooks, food, diagnostic services, state-mandated standardized tests, and the like. *Committee for Public Education v. Regan*, 444 U.S. 646 (1980); *Wolman v. Walter*, *supra*; *Lemon v. Kurtzman*, 403 U.S. at 616; *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson*, *supra*.

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[32] And see pages 14-17, *supra*, describing the extent of involvement by religious organizations in publicly-supported social welfare activities.

The district court, however, failed to draw any distinction between the various services provided under the AFLA. The opinion discusses only projects involving sex education and counseling (U.S. J.S. App. 27a-32a ("effects"), 40a-41a ("entanglement")), yet the judgment extends to all services provided under the Act. Even if the Court analyzes the AFLA under the school aid precedents, on remand the district court should determine which, if any, of the AFLA-funded services present a "substantial risk" that they might be "used for religious educational purposes." *Grand Rapids*, 473 U.S. at 388; *Committee for Public Education v. Regan*, 444 U.S. at 656.[33]

A wide array of services are provided by grantees under the AFLA. Some projects are designed to rescue and rehabilitate adolescents who have been entrapped by drugs and prostitution;[34] many more provide homes for unwed adolescent mothers with attendant medical and nutritional care;[35] others provide pregnancy testing and related health services;[36] others assist with adoptions.[37] These services are not different in character from social welfare services provided routinely, without controversy, by religious and nonreligious grantees under other federal, state, and local programs. They have no connection to any program of sectarian instruction and are exceedingly unlikely to become infused with religious indoctrination.

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[33] There is no requirement of certainty. This Court has made clear that, in order to justify prohibition under the Establishment Clause, the risk that government resources will be used for religious purposes must be "unacceptable," "too great a risk," or "substantial." *Grand Rapids*, 473 U.S. at 384, 385, 386.

[34] See, *e.g.*, J.A. 639-41 (Convenant House of New York).

[35] See, *e.g.*, J.A. 437 (St. Ann's Infant & Maternity Hospital of Maryland); J.A. 458 (St. Mary's Home).

[36] See, *e.g.*, J.A. 464-65 (St. Margaret's Hospital); J.A. 645-47 (Brightside for Children and Families, Our Lady of Providence Children's Center of West Springfield, Mass.).

[37] See, *e.g.*, J.A. 497 (Catholic Social Services of Baton Rouge).

The district court provided no reason why the delivery of noneducational care services under the AFLA should be disturbed.

D. The Judgment Below Is Vastly Overbroad.

We believe that the AFLA is entirely constitutional insofar as it distributes funds for a secular purpose among a broad spectrum of public and private organizations, neither favoring nor disfavoring religion. Even assuming *arguendo*, however, that some applications of the AFLA may be unconstitutional, the district court was premature in granting so sweeping an injunction on a motion for summary judgment. The result is to violate the Free Exercise clause by excluding organizations for no reason other than their religious affiliation or inspiration.

Specifically, the judgment is overbroad in that it bars from involvement in the AFLA organizations that neither are pervasively sectarian nor have used AFLA funds to teach or promote religion. Indeed, many of these organizations were barred even though there was no evidence submitted against them—apart from their bare religious tie. The judgment is also overbroad in that it bars religious organizations from participating in aspects of the AFLA program that are wholly unrelated to religious indoctrination and that are routinely carried out with public support in other contexts. At a minimum, therefore, this Court should reverse the district court and order a more tailored remedy, based on specific factual findings.

The district court's holding that the AFLA is invalid on its face is plainly erroneous; there are many neutral applications of the AFLA that in no way violate the Constitution. This Court should reaffirm the fundamental principle of neutrality: religious organizations should be permitted to participate in public programs on an equal footing, subject to the same requirements as other private groups. Our constitutional commitment to pluralism

demands—above all in sensitive value-laden areas—that resources be distributed to the widest possible array of private associations consistent with the secular purposes of the program. Religion is an inappropriate basis for distinction in the social welfare programs of this country.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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January 7, 1988